IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.3.2007

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HON'BLE MRS.JUSTICE CHITRA VENKATARAMAN

T.C.(A) No.241 of 2007

The Commissioner of Income Tax
Chennai .. Appellant

Vs.

M/s.Aircel Limited
No.327, Anna Salai
Chennai-600 006. .. Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'A' Bench dated 22.9.2006 made in ITA No.955/Mds/2006 for the assessment year 2000-01 against the order of Commissioner of Income Tax (A) III Chennai - 34 in I.T.A.No.390/2005-06/A-III, dated 16.01.2006 and against the order of the Assistant Commissioner of Income Tax, Company Circle-I(1) Chennai in PAN/GIR.No.AAACS 4449J/AX5-021 dated 28.07.2005

For Appellant : Mr.J.Narayanaswamy,
Jr. Standing Counsel (IT)

J U D G M E N T
(Delivered by P.D.DINAKARAN,J.)

This appeal is directed against the order of the Income-tax Appellate Tribunal dated 22.9.2006 made in ITA No.955/Mds/2006 for the assessment year 2000-01, raising the following substantial questions of law:

"1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the assessee has an option not to claim depreciation in any particular year?

2. Whether in the facts and circumstances of the case, the Supreme Court's ruling in the case of Commissioner of Income Tax v. Mahendra Mills, [2003] 243 ITR 56 would be applicable to the assessment years after the omission of Section 34(1) of the Income Tax Act and Rule 5AA of the Income Tax Rules? and

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3. Whether in the facts and circumstances of the case, explanation 5 to Section 32 of the Income Tax Act should be read to have retrospective operation, since it only explains the law as it stood?"

2.1. The Revenue is the appellant. The assessee is a company engaged in the business of providing cellular mobile telephony service. For the assessment year 2000-01, even though the assessee did not claim depreciation, the Assessing Officer, allowed the depreciation to an extent of Rs.36,91,12,722/-, holding that allowing depreciation is mandatory.

2.2. On appeal by the assessee, the Commissioner of Income Tax (Appeals), allowed the appeal in favour of the assessee and directed the Assessing Officer not to allow any depreciation for the assessment year 2000-01.

2.3. On appeal by the Revenue, the Tribunal following the decision of the Apex Court in Commissioner of Income Tax v. Mahendra Mills, [2003] 243 ITR 56 held that depreciation cannot be forced upon the assessee and where assessee had not claimed depreciation, the same should not be granted.

3. The learned standing Counsel for the Revenue fairly concedes that the issues are squarely covered against the Revenue by the decision of the Apex Court in Commissioner of Income Tax v. Mahendra Mills, [2003] 243 ITR 56, which was followed by this Court in CIT v. Sree Senha Valli Textils P. Ltd., [2003] 259 ITR 77.

4. In Commissioner of Income Tax v. Mahendra Mills, [2003] 243 ITR 56, the Apex Court held that:

"The language of the provisions of Section 32 and 34 of the Income Tax Act, is specific and admits of no ambiguity. Section 32 allows depreciation as deduction subject to the provisions of Section 34. Section 34 provides that deduction under Section 32 shall be allowed only if the prescribed particulars have been furnished. Rule 5AA of the Income Tax Rules, since deleted, provided for the particulars required for the purpose of deduction under Section 32. Even in the absence of Rule 5AA, the return of income in the form prescribed itself requires particulars to be furnished if the assessee claims depreciation.

...

The provision for claim of depreciation is certainly for the benefit of the assessee. If he does not wish to avail of that benefit for some reason, the benefit cannot be forced upon him."

(emphasis supplied)

5. The said decision of the Apex Court was also followed by this Court in CIT v. Sree Senha Valli Textils P. Ltd., [2003] 259 ITR 77.

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6. In view of the law as enunciated from the decisions referred to supra, it is clear that depreciation cannot be forced upon the assessee, when the assessee does not wish to avail of that benefit for some reason, particularly when the provision for claim of depreciation is for the benefit of the assessee.

Finding no substantial question of law arising for our consideration, this appeal is dismissed. No costs.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To:

1.The Assistant Registrar,
Income Tax Appellate Tribunal
Madras Bench "A", Chennai.
Rajaji Bhavan, III Floor,
Besant Nagar, Chennai - 90.
2.The Commissioner of Income
Tax (Appeals)-III, Chennai.
3.The Commissioner of
Income Tax, Chennai.
4.The Assistant Commissioner of
Income Tax, Company Circle I(1)
Chennai.

1 cc To Mr.Pushya Sitaraman, Standing Counsel for I.T.Cases, SR.15673.

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